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No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.* IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

1. The Air Transport Association of America ("ATA") is a membership organization comprised of twenty-three U.S. certificated air carriers. ATA's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. air carriers and employ over half a million people.[2]

ATA regularly represents the interests of its member carriers in legislative, judicial and administrative matters, and has filed numerous *amicus* briefs in federal and state court proceedings concerning a broad variety of aviation-related issues. ATA has previously participated as *amicus curiae* in this Court in *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Northwest Airlines v. Air Line Pilots Association*, 486 U.S. 1014 (1988). ATA also works closely with the various Federal agencies that regulate airline safety such as the Federal Aviation Administration and the Department of Transportation.

2. Airline Industrial Relations Conference ("AIRCON") is a voluntary membership association of United States scheduled air carriers. AIRCON was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent

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1. No counsel for either party authored this brief, either in whole or in part. No entity other than the *amici* and their members made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters indicating their consent have been filed with the Clerk of this Court.

2. ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

the member carriers with respect to related legislative, judicial and administrative matters. AIRCON has previously participated as *amicus curiae* in a number of matters before this Court including *Northwest Airlines v. Air Line Pilots Association*, 486 U.S. 1014 (1988).

3. The Regional Airline Association ("RAA") represents U.S. regional airlines and the suppliers of products and services that support the industry, before the courts, the United States Congress, the Federal Aviation Administration, Department of Transportation and other federal and state agencies to promote a healthy business climate for its members and to work with regulatory agencies and other organizations, including the traveling public, with an objective of achieving safety, efficiency and growth of the regional airlines. The 60 airline members of RAA transport 97 percent of all regional airline passengers. RAA has participated as *amicus curiae* in a number of cases in this and other federal courts including *Montauk-Caribbean Airways v. Hope*, 479 U.S. 872 (1986); *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994); and *New England Legal Foundation v, Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir 1989).

4. ATA, AIRCON, and RAA (collectively "*Amici*") are vitally concerned about the safety of commercial air transportation. This concern does not arise merely from "general considerations of supposed public interests,"[3] but from an explicit and unambiguous statutory command that obliges all air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b).

The lower courts' opinion in this case,[4] and the misunderstanding of law from which it stems, represent significant impediments to the ability of air carriers to fulfill

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3. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (citations omitted).

4. The Fourth Circuit's brief *per curiam* order adopted the reasoning of the district court as its own.

that statutory command. In the view of the lower courts here, this Court's opinions in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *W.R. Grace & Co. v. Local Union Rubber Workers*, 461 U.S. 757 (1983), deprived the federal courts of their common law authority to vacate an arbitration decision that violates well-defined and dominant public policy unless that policy explicitly "make[s] it illegal" to enforce the award. Pet. App. 21a.

As this Court noted in *Misco*, only the courts can safeguard the public's interests when asked to enforce private agreements which implicate the health and safety of the public at large. 484 U.S. at 42. These public interests "will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Id.* The courts below abdicated that responsibility, and in doing so adopted a legal standard so narrow that it literally threatens the lives and safety of the traveling public.

Amici are in a unique position to explain to the Court how the lower courts' untenable interpretation of *Misco* impedes the airline industry's efforts to provide "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). The Department of Transportation's mandatory drug and alcohol testing protocols apply to more than 200,000 employees of ATA member companies. In 1998, ATA members conducted more than 83,000 drug tests and more than 23,000 alcohol tests under the DOT's procedures. *Amici*, therefore, are particularly concerned that any standard adopted by the Court in this case account for the fact that the intensity of the public's interest in a drug-free workforce is not uniform as to all industries and sectors of the economy, and that the specific statutory obligations of air carriers make application of the narrow public policy standard adopted below particularly inappropriate.[5]

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5. There is disagreement in the circuits about whether public policy allows arbitrators to return pilots who have flown while intoxicated, (Cont'd)

SUMMARY OF ARGUMENT

1. "As with any contract, . . . a court may not enforce a collective bargaining agreement that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). Because an arbitration award rendered under a collective agreement interprets and enforces the agreement, the same public policy standard applies when a party seeks to vacate or enforce such an award. *Id.* The authority to deny enforcement of arbitration awards which violate public policy "is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law *or* public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (emphasis added).

2. The courts below read the foregoing quote from *Misco* in the conjunctive rather than the disjunctive, finding themselves to be without authority to vacate an arbitration award unless implementation of the award would cause the employer to violate the law.[6] This constricted reading of the public policy exception to the enforceability of arbitration awards is not supported either by the Court's opinion in *Misco* or by the common law rule of which *Misco* was merely an

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(Cont'd)

and other known substance abusers, to service in safety sensitive positions. *See Northwest Airlines v. ALPA*, 808 F.2d 76 (D.C. Cir. 1987) (enforcing arbitration award for reinstatement of pilot who flew while intoxicated), *cert. denied*, 486 U.S. 1014 (1988); *compare Delta Air Lines, Inc. v. Air Line Pilots Assn., Intern.*, 861 F.2d 665 (11th Cir. 1988) (applying *Misco* public policy exception to deny reinstatement to airline pilot who flew while intoxicated), *cert. denied*, 493 U.S. 871 (1989).

6. "*Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use*, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case." Op. of district court, Pet. App. 21a (emphasis added).

application.[7] Federal courts have historically refused enforcement of many contracts found to violate dominant and well-established public policies, even where no law would affirmatively proscribe implementation of the agreement.[8]

3. This Court has repeatedly held that a contract "is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Newton v. Rumery*, 480 U.S. 386, 392 (1987).[9] *Misco* made clear that the courts can and must consider the health and safety of the public at large, and, relying upon *W.R. Grace*, defined the framework for that consideration. Thus, the courts below had both the authority and the responsibility to determine whether the arbitrator's risk-reward calculus was consistent with public policy.

Under the lower courts' reading of *Misco*, however, there is no place for the exercise of judicial judgment: if an arbitration award can be implemented without causing the employer to break the law, it must be enforced even if the result is incompatible with an obvious public policy expressed unambiguously in statutes, regulations or judicial precedents. Such an approach abdicates the courts' responsibility to recognize and to consider the public interest.

4. Even under the correct legal standard, the lower court's analysis of public policy interests here was myopic. While acknowledging "a well defined and dominant public policy

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7. Indeed, the Court in *Misco* expressly declined to reach that very issue. 484 U.S. at 45 n.12.

8. *See* cases cited *infra* at n.12; *see also* Restatement (Second) of Contracts § 179, comment (b) (court "may refuse to enforce a term on grounds of a judicially developed public policy even though there is no contravention of the legislation").

9. *See also W.R. Grace*, 461 U.S. at 766 ("the question of public policy is ultimately one for resolution by the courts").

against drug use by persons employed as commercial motor vehicle drivers," Pet. App. 20a, the courts below ignored both the punitive and deterrent features of that policy, simply because neither Congress nor the Department of Transportation had the foresight to make it expressly unlawful to order reinstatement of a recidivist substance abuser. Under this reasoning, the public is put at risk whenever the legislature or the regulators lack either the foresight or the resources to prohibit expressly all conceivable forms of employee misconduct.

5. This case presents an excellent example of the sort of arbitral mischief the lower courts' reasoning condones. The grievant, James Smith, operated vehicles weighing more than 25 tons on public highways, and apparently did so with marijuana in his system on more than one occasion. In overturning his discharge, the arbitrator acknowledged that the grievant had engaged in serious misconduct, that the grievant was a recidivist, that the employer had "very real" concerns about returning the grievant to the roads, and that the company's desire to terminate the grievant was entirely "understandable." Pet. App. 27a. Nonetheless, the arbitrator ordered reinstatement because the arbitrator had sympathy for the grievant's "personal/family problem" and because the arbitrator was comforted by the conviction that if he had been "misled by the grievant," "the grievant will make another misstep with drug use and be caught." Pet. App. 28a.[10] The arbitrator treated the grievance entirely as a private workplace dispute, making no mention at all of the risks the grievant's conduct created for innocent members of the traveling public. Thus, the arbitrator was willing to accept the risk — to co-workers, and to the driving public — that the grievant might be "caught" only as a result of a tragic accident involving grievant, his 25-ton vehicle, and some unknowable number of innocent victims.

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10. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrator is not to dispense "his own brand of industrial justice").

6. The standard adopted by the lower courts here is inimical to well-defined and dominant public safety considerations. That standard should be explicitly rejected by this Court. *Amici* do not seek to give federal courts unchecked authority to police arbitration awards for "general considerations of supposed public interests."[11] *Misco* condemns such an approach, because it would undermine important policies of federal labor law, and the effectiveness of arbitration for achieving labor peace. Nonetheless, when public safety is implicated, the courts must retain, and prudently exercise, the authority to consider the public's interests — interests which "will go unrepresented unless the judiciary takes [them into] account." *Misco*, 484 U.S. at 42. This case thus presents the mirror image of *Misco*, where the lower court was too eager to deny enforcement of an arbitration award. Here, the lower courts felt so constrained by their narrow reading of *Misco* that they failed to engage in the careful analysis expressly required by *Misco* and *W.R. Grace* and the longstanding public policy doctrine upon which those decisions were based.

ARGUMENT

I. UNDER MISCO AN ARBITRATION AWARD CAN BE VACATED ON PUBLIC POLICY GROUNDS EVEN IF ENFORCING THE AWARD WOULD NOT REQUIRE UNLAWFUL CONDUCT.

The federal courts have an affirmative obligation to refuse to enforce any private agreement that violates public policy.[12]

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11. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (citations omitted).

12. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States . . . Where the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial

(Cont'd)

"As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace*, 461 U.S. at 766. "A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is [merely] a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or pubic policy." *Misco*, 484 U.S. at 42.[13]

The lower courts here, however, read *Misco*'s public policy exception as a significant limitation on this common law authority. They erred in doing so. As explained below, this fundamental error led the courts below to default on their obligation to evaluate carefully the public policy issues presented.

The ultimate rationale of the courts below was expressly stated: "*Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use*, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case" Pet. App. 21a (citation omitted, emphasis added). In other words, because no statute made reinstatement expressly unlawful,

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power."); *Steele v. Drummond*, 275 U.S. 199, 204 (1927); *Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850). *Newton v. Rumery*, 480 U.S. 386, 392 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"); *Muschany v. United States*, 324 U.S. 49, 66 (1945); *A.C. Frost & Co. v. Couer D'Alene Mines Corp.*, 312 U.S. 38, 44 (1941) ("contracts in contravention of public policy are not enforceable"); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (same).

13. For purposes of the public policy exception, labor agreements and arbitration awards are not subject to standards different from other contracts; they are to be treated just like "any contract." *W.R. Grace*, 461 U.S. at 766.

the court held that reinstatement cannot be against public policy. This rationale is flawed for at least four reasons.

First, the courts below substantially understated the scope of their own authority under *Misco*. In *Misco*, the Court stated that "a court may refuse to enforce contracts that violate law *or* public policy," expressly using the disjunctive word "or." 484 U.S. at 42 (emphasis added). Thus, a demonstration that *either* a violation of law *or* a violation of public policy is present should suffice to void the award. *See Steele v. Drummond*, 275 U.S. 199, 204 (1927) and *Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850) (courts have authority to refuse to enforce agreements "to do an act that is illegal; *or* which is inconsistent with sound morals or public policy") (emphasis added).[14]

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14. *See also* Restatement (Second) of Contracts §§ 178, 179 comment (b) (courts "may refuse to enforce a term on grounds of a judicially developed public policy even though there is no contravention of . . . legislation"); 17A Am. Jur. 2d *Contracts* § 257 ("It is not necessary to have a statute to prohibit a contract which is against public policy; in such a case, public policy itself prohibits it"). Other courts have refused to enforce contractual agreements on public policy grounds in a variety of contexts even in the absence of a demonstration that the agreement violated any statute. Many states, for example, refuse to enforce agreements insuring against punitive damage liability because to do so would assertedly license the insured to engage in reckless conduct. *See Liability Insurance Coverage As Extending To Liability For Punitive Or Exemplary Damages*, 16 A.L.R.4th 11 (collecting cases). Courts routinely modify or refuse to enforce covenants not to compete where the duration or geographic scope of the agreement would unreasonably restrict the promisor's ability to earn a living. *See Enforceability of Restrictive Covenant, Ancillary To Employment Contract, As Affected By Duration Of Restriction*, 41 A.L.R.2d 15 (1997) (collecting cases). Courts also refuse to enforce some contractual forum-selection provisions because to do so would assertedly violate public policy. *See Effect, On Application Of 28 U.S.C. § 1404(a) Or Forum Non Conveniens In Diversity Case, Of Contractual Provision Fixing Forum*

(Cont'd)

The Court has considered the public policy doctrine in contract enforcement in a wide variety of circumstances, but has never suggested that only a positive violation of law would suffice to render an agreement unenforceable. Indeed, in *Hurd v. Hodge*, 334 U.S. 24 (1948), for example, the Court assumed, for purposes of an alternative holding, that it would not directly violate any statute for the courts of the District of Columbia to enforce racially discriminatory covenants, but nonetheless concluded that the covenants could not be enforced because to do so would offend the public policy of the United States as expressed in statutes and the Constitution. 334 U.S. at 34-36.

Second, although *Misco* directed lower courts to look to judicial decisions, as well as to statutes, as a basis for determining when enforcement of an arbitration award would violate public policy, the court of appeals in this case concluded that an arbitration award becomes unenforceable only when it is proscribed by a statute. *Misco* clearly contemplated that the lower courts would be called upon to protect well-defined public policies expressed in judicial decisions by enforcing those policies in ways and contexts that the courts and legislatures had not yet addressed.

Third, this Court's decisions describe a balancing test for evaluating the merits of a public policy claim; the approach adopted by the lower courts here is incompatible with that process. As the inquiry was framed in *Newton v. Rumery*, 480 U.S. 386 (1987), a court confronted with a public policy argument must ask whether "the interest in . . . enforcement is outweighed . . . by a public policy harmed by enforcement of

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For Enforcement Or Laws Governing Interpretation — Post-Bremen Cases, 123 A.L.R. Fed. 323. In each of these instances, courts have examined the relevant statutes and judicial precedents and found that the contractual provisions at issue undermined well defined and dominant public policies. They have reached this conclusion even though enforcement of the provision would not have been "illegal."

the agreement." *Id.* at 392. Thus, "whether a contract shall be enforced require[s] consideration of the broad purposes of relevant statutes and the probable effect [of enforcement] upon this." *A.C. Frost*, 312 U.S. at 44. The zero-sum equation adopted by the courts below however, pretermits this analytical process. If implementation of an award would violate the law, the award is "illegal" and cannot be implemented regardless of countervailing interests. Conversely, under the lower courts' ruling here, despite the presence of a "well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs" (Pet. App. 18a), if no law would be violated by implementation of the award, the court's work is at an end; the award must be enforced. This approach reduces the courts' role under the public policy exception to a ministerial function. Such an approach cannot be reconciled with the balancing process this Court repeatedly has found to be "imperative."[15]

Fourth, the courts below erred by ignoring the punitive and deterrent aspects of the public policy the acknowledged, but found insufficient to vacate the award. While there is certainly a public policy favoring collective bargaining and arbitration, that policy has never been held to trump all other public policies — especially those dealing with public safety. Under the reasoning of the courts below, every labor arbitration award must be enforced unless the legislature or the regulators have had the resources and the foresight to address expressly every conceivable permutation of employee misconduct that may arise.[16]

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15. *Steele v. Drummond*, 275 U.S. 199, 204 (1927) (*quoting Marshall v. Baltimore & Ohio R.R.*, 16 How. 314 (1850).

16. Under the rationale adopted below, for example, a court would have no authority to vacate an arbitration award reinstating a day care worker who had been found guilty of child molestation or distributing child pornography unless the legislature had thought to outlaw reinstatement in precisely those circumstances. Because no rational day care center would ever conceive of hiring such an employee, it is unlikely that the legislature would think to proscribe reinstatement.

If, as this Court has repeatedly held, "the question of public policy is ultimately one for the courts," the rationale adopted by the lower courts here represents an unacceptable abdication of responsibility. Like the arbitrator, the lower courts here simply left the real public interest, and public safety, out of its analysis.

II. THE DECISION ADOPTED BELOW LEAVES IMPORTANT PUBLIC INTERESTS ENTIRELY UNPROTECTED AND THREATENS THE HEALTH AND SAFETY OF THE PUBLIC.

Even if *Misco* were not controlling here, important public interests would nonetheless support reversal of the decision below. No one could seriously dispute that the public has a compelling interest in preventing persons under the influence of drugs or alcohol from operating dangerous commercial vehicles on public roads (or from flying commercial aircraft), and a related interest in deterring such conduct before it occurs. Congress, the federal government agencies, and the legislatures of all 50 states have implemented rules to protect the public safety in this regard. Indeed, the courts below were compelled to acknowledge that "[t]here is a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs [or by employees who have] merely test[ed] positive for drugs . . . ." Pet. App. 18a-19a.

Nonetheless, the courts below felt obliged to enforce the award because reinstatement was not expressly unlawful under these numerous federal or state regulations. This rationale is flawed because: (1) it eliminates public safety from the equation, unless every aspect of public safety has been written into a positive law that relates directly to the reinstatement of employees; (2) it ignores the best available evidence regarding recidivism in substance abuse; and (3) it underestimates both the difficulty and importance of managing safety risks to innocent members of the public travelling on the highways and other forms of transportation.

A. The Arbitrator And The Lower Courts Failed To Consider The Public Interest In Safety

In this case, the arbitrator acknowledged the very real concerns petitioner had in returning respondent to his safety-sensitive position, and conceded the possibility that he had been "misled by the grievant." Pet. App. 28a. In sympathy for the domestic problems the grievant had recently experienced, however, the arbitrator decided to return the grievant to the roads. The arbitrator expressly acknowledged the possibility that he had made the wrong decision, but expressed confidence that, if that were so, "the grievant will make another misstep with drug use and be caught." Pet. App. 28a. The arbitrator treated the grievance entirely as a private workplace dispute; his decision makes no mention at all of the public interest in avoiding the risk that other innocent persons would be the real victims of the grievant's next "misstep."

That failure alone warrants refusal to enforce the arbitration award. Arbitration decisions simply must be held to a higher standard of review when important public interests are involved in an otherwise private grievance between employee and employer; otherwise there is a great risk that those public interests will be submerged or ignored, as happened here. *Cf. Cole v Burns Int'l Security Servs.*, 105 F.3d 1465, 1486-87 (D.C. Cir. 1997) (public interest requires higher standard of review for arbitration awards based on public law claims).

B. High Rates Of Recidivism By Substance Abusers Make The Court's Exclusively Prospective Focus Unwarranted

The most recent studies of substance abuse recidivism underscore the danger of the lower courts' approach.[17] For example, recent clinical trials of a new drug intended to help alcoholics quit drinking trumpeted results that showed a 38%

17. The brief filed in this case by the Institute for a Drug-Free Workplace contains a far more extensive analysis of the problem of substance abuse recidivism.

relapse rate among those receiving the drug; this compared favorably to the 60% relapse rate for the control group.[18] Similarly, a national study of treatment modalities for cocaine dependence reported that in the year following treatment, 23.5% were using cocaine again at least on a weekly basis, and an additional 18% had returned to another drug treatment program.[19]

The inclination of arbitrators to give grievants a second — or third or fourth — chance may be, in many circumstances, appropriate; in most cases the dispute will be an entirely private matter between the grievant and the bargaining parties. Where a recidivist substance abuser benefits from this sort of lenity, however, and is placed back in a safety sensitive position as a result, the public's interest becomes paramount. It was error for the courts below to fail to consider this interest.[20]

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18. *Treatment of Alcoholism, Part 1*, Harvard Mental Health Letter, No. 11, Vol. 16 (May 1, 2000) (available on LEXIS, NEWS library, CURNEWS file).

19. *See A National Evaluation Of Treatment Outcomes For Cocaine Dependence*, 56 Archives of General Psychiatry 506-14 (1999). Unfortunately, the statistics do not begin to describe the problem. Take for example the case of Sam Epps, a light-rail train operator for the Maryland Department of Transportation. Epps tested positive for drugs in 1994, and "successfully" completed an employer-mandated rehabilitation program. In February, 2000, Epps lost consciousness while driving a train and crashed into a barrier. Twenty two passengers were taken to the hospital. Investigation following the accident confirmed that Epps had taken cocaine, codeine, and a prescription pain killer before driving the train. *See Transportation Industry Maintains Anti-drug Focus: Tests, Rehabilitation Used To Ensure A Sober Workforce*, The Baltimore Sun, at 1B (February 27, 2000).

20. The FAA has recognized the poor success rate for alcohol treatment programs by barring recidivists from certain safety sensitive positions. 14 C.F.R. Part 121, App. J. (V)(B).

C. The Courts Must Have The Authority To Vacate Any Arbitration Award That Is Inconsistent With The Employer's Duty To Public Safety

Many employers, including petitioner, have obligations to public safety, and to worker safety, and may face civil tort liabilities if errant employees violate those obligations. *Amici* wish to call the Courts' attention to the exceptionally high safety standards imposed on them by law.

The Federal Aviation Act obligates air carriers to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(b). The D.C. Circuit vividly described the carrier's obligations in *Murnane v. American Airlines*, 667 F.2d 98 (D.C. Cir. 1981) (emphasis added), *cert. denied*, 456 U.S. 915 (1982):

> The safe transportation of its passengers is the essence of [the commercial air carrier's] business . . . . [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, *the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.*

Id. at 101 (emphasis added; internal citations omitted).[21]

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21. *See also Coupe v. Federal Express Corp.*, 121 F.3d 1022, 1025 (6th Cir. 1997) ("We know, moreover, that [operating with] the 'highest degree of safety in the public interest' is 'reasonably necessary' to Federal Express's aircraft operations — for Congress has said so"), *cert. denied*, 523 U.S. 1020 (1998); *EEOC v. American Airlines*, 48 F.3d 164, 170-71 (5th Cir. 1995) (*quoting* extensively, and with approval,

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The standard adopted by the lower courts in this case is incompatible with the safety obligations of airline employers. The risks are illustrated by *Northwest Airlines v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987), where the D.C. Circuit also applied this standard of review and affirmed an arbitration award reinstating an alcoholic pilot who had endangered the lives and safety of his passengers and fellow crew members by flying drunk. The arbitrator in that case concluded that the airline was obligated to reinstate the pilot automatically once he was granted a license to fly by the FAA. The court gave short shrift to the Federal Aviation Act's safety imperative, concluding that because it would not be illegal for the airline to employ the grievant as a pilot once he had his license back, then the airline was obligated to do so.[22]

(Cont'd)

Murnane's conclusions regarding court's inability to second guess carrier's standards when related directly to operational safety); *Robinson v. American Airlines*, 908 F.2d 1020, 1023 (D.C. Cir. 1990) ("airline . . . must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*") (emphasis in original; internal citation omitted); *Johnson v. American Airlines*, 745 F.2d 988, 993 (5th Cir. 1984) (holding that "[c]ourts simply do not possess the expertise with which to supplant [the airline's] judgment" with respect to safety issues), *cert. denied*, 472 U.S. 1027 (1985).

22. The D.C. Circuit's central premise was badly mistaken: an FAA-issued pilot's license does not automatically satisfy the airline's obligations to achieve the "highest possible degree of safety." Rather, the carrier has an obligation to confirm that each of its pilots "holds an appropriate current airman certificate," "has any required . . . medical certificate[ ]," *and* "[i]s *otherwise* qualified for the operation for which he is to be used." 14 C.F.R. § 121.383(a)(1)-(3) (emphasis added). Thus an FAA decision to issue a medical certificate to a pilot after completing rehabilitation does not constitute a regulatory confirmation that the pilot is able to engage in flying of any particular variety, or relieve the carrier of its *independent* obligation to confirm that the pilot "[i]s *otherwise* qualified for the operation for which he is to be used," *i.e.*, able to, and likely to exercise consistently the judgment and discretion of a commercial airline pilot in a responsible manner.

To the extent that this analysis has any validity outside the airline industry, it is simply incompatible with the Federal Aviation Administration's regulatory scheme. That framework depends expressly on the agency's understanding that "*employers* will exercise responsible judgment in determining whether employees not expressly barred from service [by the FAA's rules] should be permitted to perform other safety sensitive duties." 59 Fed. Reg. 42922 (Aug. 19, 1994) (emphasis added).

Thus, the FAA relies on the fact that commercial airlines will impose even more stringent standards than does the agency for the most safety sensitive jobs. The Federal Aviation Act distinguishes expressly between the air carriers' obligation to maintain the *highest* standard, and the FAA's lesser obligation to set "*minimum*" standards. 49 U.S.C. § 44701(b), (d) (1998).[23]

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23. As explained in the FAA Air Transportation Operations Inspector's Handbook, the higher standard to which a carrier is held obligates the carrier to take safety precautions irrespective of the FAA's minimum standards:

> The FAA . . . has the duty, as authorized by 49 U.S.C., subtitle VII, § 40101, ["Aviation Programs"] to establish *minimum* standards, rules, and national policy which provide adequately for national security and safety in air commerce. . . .
>
> 49 U.S.C. § 44701 specifies that, when prescribing standards and regulations and in issuing certificates, the FAA shall give full consideration "to the duty resting upon air operators to perform their services with the *highest* possible degree of safety in the public interest . . ." In other words, 49 U.S.C. charges the FAA with the responsibility of promulgating and enforcing *adequate* standards and regulations. At the same time, 49 U.S.C. recognizes that holders of air operator certificates have a direct responsibility of providing air transportation with the *highest* possible degree of safety. The meaning of 49 U.S.C. § 44701(b), should be clearly understood. *It means that*

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Federal courts have recognized that the Federal Aviation Act expects air carriers to set standards higher than the minimums promulgated by the FAA:

> [T]hat [an airline's medical] criteria exceed the FAA's minimum requirements is irrelevant. An airline is free to impose more stringent requirements, and "must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*."

Robinson v. American Airlines, 908 F.2d at 1023 (*quoting Murnane*, 667 F.2d at 101) (emphasis in original).[24]

The FAA's minimum standards, then, offer no safe harbor for airlines in a given situation; their responsibilities for risk management are appreciably greater. As this Court has observed:

> The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would

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(Cont'd)

> *this duty (or responsibility) rests directly with the air operator, irrespective of any action taken or not taken by an individual FAA inspector or the FAA.*

FAA Air Transportation Operation's Inspector's Handbook, DOT publication no. 8700.10 CHG 16, at 2-8 (Dec. 22, 1997) ("FAA Handbook") (emphasis added). *See also* FAA Handbook at 2-8 (FAA "has the duty to establish minimum standards . . ."; "safety standards applicable to air transportation (air carriers) are more stringent than standards applicable to persons or organizations not involved in common carriage").

24. In fact, the FAA has specifically stated that its own rule regarding consumption of alcohol by crew members (which prohibits consumption within an eight hour period prior to takeoff) is "a 'rock bottom' minimum," 35 Fed. Reg. 17,036 (1970), and that "an excellent rule is to allow twenty-four hours between the last drink and the takeoff time." 35 Fed. Reg. 9217 (1970).

> require running the risk until a tragic accident would prove that the judgment was sound."

Western Air Lines v. Criswell, 472 U.S. 400, 419-20 (1985). Thus, it would be error — and an error that could lead to tragic results — for a court to assume that the public's interest in maintaining the safest possible air transportation system is adequately served by a determination that no positive command prohibited enforcement of an arbitration award returning a recidivist substance abuser to an airplane cockpit, or another safety sensitive position. The standard adopted by the lower courts here would have precisely that result, and the Court should repudiate that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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